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No._____

IN THE

Supreme Court of the United States

October Term, 1986

EILEEN BAILEY,

Petitioner,

vs.

GRAND TRUNK LINES NEW ENGLAND,
CANADIAN NATIONAL RAILWAY,
MIDLINE DIVISION, ST. LAWRENCE REGION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Does the right to jury trial guaranteed by the Federal Employers' Liability Act take precedence over the Foreign Sovereign Immunity Act's insulation from jury trial?

2. Did the Canadian government waive its insulation from jury trials by operating a railroad in the United States?

3. Based on the facts of this case, did the United States Court of Appeals for the Second Circuit err in failing to enter judgment on the issue of liability in favor of the plaintiff and remand for a new trial solely on the issue of damages?

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Relevant Statutes

45 U.S.C. Section 51—Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

28 U.S.C. Section 1330 — Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. Section 1603 — Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

IN THE

United States Supreme Court

October Term, 1986

No._____

EILEEN BAILEY,

Petitioner,

vs.

GRAND TRUNK LINES NEW ENGLAND,
CANADIAN NATIONAL RAILWAY,
MIDLINE DIVISION, ST. LAWRENCE REGION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Jurisdiction

The decision of the United States Court of Appeals for the Second Circuit in this matter was dated and entered on November 19, 1986. A petition for rehearing and suggestion for rehearing *en banc* were denied by an order dated and filed March 19, 1987.

This Court's jurisdiction is conferred by 28 U.S.C. Section 1254(1).

Statement of the Case*

On June 3, 1983, Jeffrey Bailey was operating a Canadian National Railway brushcutter in New Hampshire. Although a railway regulation required that such operations proceed with two men "working together", Bailey's partner did not accompany him on the machine, but rather traveled in a truck on a highway parallel to the track. This system was employed despite the fact that portions of the track were not always visible from the highway.

At approximately 9:30 a.m., Bailey derailed. His partner did not see the derailment and lost radio contact with Bailey. Because the partner did not realize that Bailey had derailed, a search did not begin until nearly three hours after the accident. Bailey was pinned under the brushcutter for approximately four and one-half hours and died four days later. It should be noted that the point of the derailment was not visible from the highway on which Bailey's partner was traveling, but was visible from a smaller road next to the track.

Plaintiff Eileen Bailey commenced suit against the Canadian National Railway, a corporation whose shares are owned by the Canadian government. Jurisdiction was predicated upon the Federal Employers' Liability Act, 45 U.S.C. Section 56 (FELA). The district court judge granted the railroad's motion to strike the jury trial demand because he believed that the Foreign Sovereign Immunities Act, 28 U.S.C. Sections 1330 and 1602-11 (FSIA) precluded a jury trial. The judge then found that the railroad had not been negligent and entered judgment in favor of the defendant.

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* This statement is taken from the panel opinion, 805 F.2d 1097 (2d Cir. 1986).

Eileen Bailey appealed, and by a 2-1 decision, a panel of the United States Court of Appeals for the Second Circuit affirmed the District Court's order denying the jury trial. The panel unanimously vacated the finding that the railroad was not negligent and remanded the case for further proceedings. A motion for rehearing and suggestion for rehearing *en banc* were denied.

ARGUMENT

This case presents the Court with an issue of first impression: whether the right to a jury trial—elevated to special status under the FELA—should be denied to a plaintiff simply because the corporate shares of the plaintiff's employer are owned by a foreign sovereign. This important question of federal law has not been, and indeed should be, decided by this Court. It is therefore respectfully submitted that this Court should grant a Writ of Certiorari to review the 2-1 decision of the panel of the United States Court of Appeals for the Second Circuit.

I. The Second Circuit panel erred in affirming the denial of a jury trial in an FELA action.

A. The Federal Employers' Liability Act's Implicit Guarantee of a Jury Trial Takes Precedence Over The Foreign Sovereign Immunities Act's Insulation From Jury Trial.

Simply stated, the FELA has for years been interpreted to guarantee and give special status to the right to jury trial, despite the fact that the statute is expressly silent on that issue. *See, e.g., Bailey v. Central Vermont Railway,* 319 U.S. 350, 354 (1943); *Mendoza v. Southern Pacific Transportation Co.,* 733 F.2d 631, 633 (9th Cir. 1984); *Johannessen v. Gulf Trading & Transportation Co.,* 633 F.2d 653, 656 (2d Cir. 1980); 5 J. Moore, *Moore's Federal Practice,* paragraph 38.12[6] at 38-125 (2d ed. 1985); *Bailey v. Grand Trunk Lines New England,* 805 F.2d 1097, 1106 (2d Cir. 1986) (Van Graafeiland, J., dissenting in part). The Second Circuit panel's simple statement, in footnote, that the FELA does not expressly provide the right to a jury trial, virtually ignores decades of precedent and interpretation, and gives short shrift to a time honored right. The issue

presented to this Court, and the issue which the Second Circuit failed to consider, is whether the FSIA's insulation from jury trial applies in an action brought under a statute implicitly or explicitly guaranteeing the right to a jury trial.

Professor Moore has considered this very issue and has reached a conclusion consistent with Judge Van Graafeiland's dissent below. 1 Moore's Federal Practice, paragraph 0.66[44] at 700.180 (2d ed. 1985) interprets the FSIA, and notes that actions against a foreign sovereign "are non-jury actions . . . *except in cases in which trial by jury is provided for by statute*" (citations omitted) (emphasis added). As examples of statutes which provide a right to jury trial and thus create an exception to the FSIA, Professor Moore refers to paragraph 38.12 which includes explicit reference to the FELA in paragraph 38.12[6]. As Professor Moore has noted, "it is well settled that the right of jury trial is part and parcel of an action brought by an injured employee in the federal courts in reliance upon . . . the Federal Employers' Liability Act . . .". 5 Moore's Federal Practice, paragraph 38.12[6] at 38-124, 38-125 (2d ed. 1985).

Moreover, giving precedence to the FELA's implicit jury trial guarantee would be consistent with the legislature's intent in enacting the FSIA. As Judge Van Graafeiland's dissent correctly points out, if Congress intended to abrogate the right to jury trial in a FELA action by its passage of the FSIA, it would have specifically said so. *See Bailey v. Grand Trunk Lines New England, supra*, 805 F.2d at 1107 (Van Graafeiland, J., dissenting in part). The denial of a jury trial in this case would indeed come as a surprise to "those members of Congress who are familiar with the salutary purposes underlying the enactment of the FELA." *Id.*

The fact that the FELA's jury trial guarantee is implicit rather than explicit should make no difference here. First, as noted above, decades of precedent have led Professor Moore to conclude that the FELA guarantees railroad workers the right to a jury trial just as surely as if the statute so stated in black and white.

Moreover, a comparison between the FELA and the Jones Act further supports this conclusion. The Jones Act incorporates the provisions of the FELA and "expressly provides for seamen the cause of action—and consequently the entire judicially developed doctrine of liability—granted to railroad workers by the FELA". *See Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 770 (9th Cir. 1981) (quoting *Kernan v. American Dredging Co.*, 355 U.S. 426, 439 [1958]). Indeed, many cases make reference to liability under the Jones Act and the FELA interchangeably, and it is clear that the Jones Act and the FELA afford the workers within their scope "the same additional rights against their employer". *See, e.g., Neal v. Saga Shipping Co.*, 407 F.2d 481, 485 (5th Cir. 1969) (Rubin, J.), *cert. denied*, 395 U.S. 986 (1969); *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960); *Barbaroza v. Texaco, Inc.*, 434 F.2d 121 (1st Cir. 1970); *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958); *Lies v. Farrell Lines, Inc.*, 641 F.2d 765 (9th Cir. 1981).

Since the Jones Act explicitly provides for a jury trial, the FELA likewise must include, albeit implicitly, a jury trial as part of its remedy. Moreover, since the courts have conclusively stated that a jury trial is part of the FELA remedy, and since the FELA and the Jones Act have been interpreted virtually identically, there was no need for Congress to amend the FELA to bring it in line with the Jones Act by expressly guaranteeing the right to jury trial.

Seen in this light, the Second Circuit panel's citation of numerous cases in which the FSIA was found to strip a plaintiff of a jury trial is misplaced, since these cases deal with common law jury trial demands rather than demands made under statutes implicitly or explicitly guaranteeing the right to a jury trial. Indeed, in *Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872 (2d Cir. 1981), the court expressly recognized that there may be cases which arise under federal statutes where the right to jury trial might conflict with the FSIA. *Id.*, 639 F.2d at 876 n.8. The clear implication of this footnote is that the result in such a case may differ from that in *Ruggiero*. *Ruggiero* thus leaves open the question whether the FSIA precludes a jury trial in an action brought under a statute which guarantees the right to jury trial. That question is clearly presented in the present case, but was not addressed by the Second Circuit panel.

Finally, it should be noted that even if the FSIA is the sole jurisdictional basis for actions against foreign sovereigns, this does not end the inquiry regarding whether a foreign sovereign defendant is insulated from jury trial. The preclusion of jury trials in actions against foreign sovereigns is not jurisdictional in nature, *see Houston v. Murmansk Shipping Co.*, 667 F.2d 1151, 1153-54 (4th Cir. 1982), and the trial court in the case at bar therefore erred in holding that it simply did not have jurisdiction to entertain this action before a jury. The proper inquiry for the court should have been whether to apply the FSIA's preclusion of jury trial in the face of a statute which has been interpreted to guarantee a jury trial.

This Court is thus faced with its first opportunity to reconcile the FSIA's preclusion and the FELA's guarantee of jury trials. As noted above, one compelling reconciliation has been provided by Professor Moore's argument that actions against a foreign sovereign should be non-jury *except* under statutes like the FELA which provide for trial by jury. *See* 1 Moore's Federal Practice, paragraph 0.66[4], *supra;* 5 Moore's Federal Practice paragraph 38.12[6], *supra.*. Moreover, because Federal Rule of Civil Procedure 38 guarantees that jury trials are preserved "inviolate" when the right to trial by jury is granted either by statute or by the Constitution, and because the FSIA does not expressly abrogate the right to jury trial in cases brought under statutes guaranteeing the right to jury trial, it is respectfully submitted that Congress did not intend to abrogate the right to trial by jury in actions under the FELA and similar statutes. Hence, the FELA's guarantee of the right to jury trial should take precedence over the FSIA's preclusion of this right.

3. The Canadian National Railway Waived its Right to a Non-Jury Trial by Operating a Railroad in the United States.

In *Parden v. Terminal Railway,* 377 U.S. 184 (1964), the United States Supreme Court held that a state, by operating a railroad in interstate commerce, implicitly waived its sovereign immunity and agreed to be held to the rules of the FELA. The ultimate lesson of *Parden* is that the protections of the FELA cannot be vitiated based upon the unrelated factor of who happens to own the corporate shares of the defendant. It is therefore respectfully submitted that by operating a railroad in interstate commerce, the Canadian National Railway should be held to have waived its insulation from jury trial stemming from its sovereign status.

The Second Circuit panel opinion mistakenly suggests that the claim made by plaintiff is that the railway waived its right under the terms of the FSIA. Such analysis evidences a serious misunderstanding of plaintiff's argument. Since the FSIA provides for a waiver of sovereign immunity, but also provides for an insulation from jury trial, the panel's characterization of plaintiff's argument merely sets up a straw man.

Plaintiff's argument is not that the railway waived its right to a jury trial under the explicit terms of the FSIA. Rather, it is that the sovereign immunity of the defendant—and the protection from jury trial provided as a result of that sovereign immunity—is implicitly waived according to the analysis in *Parden* and under the FELA. In other words, plaintiff respectfully submits that the railroad has waived application of the FSIA's insulation from jury trial by its activities. Just as the state of Alabama took itself out of the sovereign immunity protections of the Eleventh Amendment and placed itself within the parameters of the FELA by its operation of a railway in intestate commerce, *see Parden, supra,* so the Canadian government has taken itself out of the insulation from jury trial of the FSIA and has made itself subject to the guarantees of the FELA by the identical activity.

The Second Circuit panel's analysis emasculates *Parden's* implied waiver doctrine and allows the precious right to jury trial in an FELA action to turn upon the arbitrary circumstance of who happens to own the corporate shares of the defendant. While Mrs. Bailey has been denied a jury trial because her husband happens to have been employed by a railroad owned by a foreign government, an identical plaintiff employed by a privately owned but otherwise identical railroad would be

guaranteed the right to a jury trial. It is exactly this sort of injustice that *Parden's* implied waiver analysis was designed to prevent.

Having chosen to operate a railroad in the United States and to take advantage of the benefits of United States laws, the defendant must also accept the burdens imposed by those laws. Included among those burdens are the protections afforded railroad workers under the FELA, and specifically the right to jury trial implicitly provided by that statute. Just as the state of Alabama was held to have waived its constitutional sovereign immunity, so the Canadian National Railway should have been held to have waived the insulation from jury trial stemming directly from the statutory handling of its sovereign status.

II. The Second Circuit panel erred in failing to reverse the District Court's judgment, order that judgment be entered for plaintiff on the issue of liability and remand the case for a new trial on the issue of damages.

The Second Circuit held that the District Court's judgment in favor of defendant was clearly erroneous and therefore vacated the judgment in favor of the railway and remanded the case "for further proceedings consistent with this opinion". Of course, plaintiff agrees with the panel's findings that the District Court's judgment was clearly erroneous. However, it is respectfully submitted that the panel's recitation of the facts leads to the inescapable conclusion that the railway was negligent. Therefore, the panel should have reversed the judgment below, ordered that judgment be entered in favor of the plaintiff and remanded for a new trial on the issue of damages.

For example, the panel notes that the railway had a safety rule requiring two employees to accompany a work unit, and that Bailey's co-worker did not accompany him on the unit. Rather, the co-worker simply drove along the highway parallel to the route that the plaintiff planned to take on the brushcutter. Indeed, the panel expressly pointed out that the derailment occurred at a point where the track was not visible from the highway and that there was a smaller road along side that portion of the route from which the co-worker could have seen the derailment. The co-worker could have used this smaller road and could have watched Bailey's travel, but did not. As Judge Van Graafeiland points out in that portion of his opinion concurring with the majority, it is indeed "difficult to understand how Mrs. Bailey could be denied all recovery, even for the three hours of pain and suffering her husband endured while lying under the overturned brushcutter calling vainly for help." 805 F.2d at 1103.

Furthermore, the crucial time lapse in finding Mr. Bailey undoubtedly had some effect, "even the slightest", in causing or aggravating Mr. Bailey's injuries.

The Court of Appeals should therefore have simply ordered that judgment be entered on behalf of plaintiff with respect to liability, and that a new trial be held solely on the issue of damages.

Conclusion

It is respectively submitted that this Court should grant a Writ of Certiorari in order to address the issues raised above.

Dated: Buffalo, New York
June 9, 1987

Respectfully submitted,

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APPENDIX "A"

Decision of the United States Court of Appeals for the Second Circuit, Docket No. 85-7583, entered November 19, 1986

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 454—August Term, 1985

(Argued November 19, 1985

Decided November 19, 1986)

Docket No. 85-7583

EILEEN BAILEY,

Plaintiff-Appellant,

—against—

GRAND TRUNK LINES NEW ENGLAND, CANADIAN NATIONAL RAILWAY, MIDLINE DIVISION, ST. LAWRENCE REGION,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, NEWMAN and MINER,

Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Vermont (Billings, J.), entered

after a bench trial, finding in favor of defendant Canadian National Railway in an action brought under the Federal Employers Liability Act.

Affirmed in part, vacated in part, and remanded.

Van Graafeiland, Circuit Judge, concurs in part and dissents in part, in a separate opinion.

JOHN F. COLLINS, Buffalo, NY (Collins, Collins & DiNardo, Buffalo, NY) LAWRENCE J. VILARDO, Buffalo, NY (Damon & Morey, Buffalo, NY) (of counsel) *for Plaintiff-Appellant.*

ROBERT B. HEMLEY, DENNIS R. PEARSON, Burlington, VT, (Gravel and Shea, Burlington, VT, (of Counsel) *for Defendant-Appellee Canadian National Railway.*

MINER, *Circuit Judge*:

Eileen Bailey, administratrix of the estate of Jeffrey Bailey ("Bailey"), appeals from a judgment of the United States District Court for the District of Vermont (Billings, J.) finding in favor of defendant Canadian National Railway ("CNR") in an action brought under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (1982). Appellant also challenges an earlier ruling of the district court that, pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611 (1982),

and 28 U.S.C. § 1330(a) (1982), struck her demand for a jury trial. *See Bailey v. Grand Trunk Lines New England*, 609 F. Supp. 48 (D. Vt. 1984). We affirm Judge Billings' decision with respect to the jury trial issue, but vacate the judgment as to liability and remand for further proceedings.

I. BACKGROUND

On June 3, 1983, Bailey was operating a CNR railroad track brush cutter on a section of New Hampshire railroad track while his partner, Ronald Riendeau, drove in his truck on a highway that ran parallel to the track. Although a CNR regulation required that all operations involving track machines proceed with at least two men "working together," the employees' practice was to have one man operate the machine on the track while his partner traveled on the highway to "flag" him at the crossings. This system was employed despite the fact that portions of the track were not always visible from the highway.[1]

The June 3rd work assignment called for Bailey and Riendeau to cover approximately fifty miles of track, from Berlin, New Hampshire to Island Pond, Vermont. By the time Riendeau arrived at the first crossing in West Milan, New Hampshire, he noticed that Bailey already had been flagged across the intersection. Riendeau thus drove to the second crossing in Stark, New Hampshire,

1. Customarily, the employees maintained radio contact in order to know of each other's location. Even this contact, though, was sporadic, since there were "dead spots" along the highway from which radio communication was impossible. Both Bailey and Reindeau were able, however, to call a CNR operator who could then relay information between them.

Appendix "A"—Decision of the United States Court of Appeals for the Second Circuit, Docket No. 85-7583, entered November 19, 1986.

where he waited a short time for Bailey to arrive. Believing that Bailey again had preceded him, Riendeau drove ahead to the third crossing in Groveton, New Hampshire. From Groveton, Riendeau returned along the highway to West Milan to look for Bailey. Since he could not see Bailey from the highway, he continued on to Island Pond. Arriving there at approximately 10:30 A.M., Riendeau attempted several times to contact Bailey by radio. Bailey, however, had derailed at approximately 9:30 A.M., and therefore was unable to respond. It is significant to note that although Bailey's derailment occurred at a point where the track was not visible from the highway, there existed alongside that portion of the route a smaller road from which Riendeau's vision of the track would not have been obscured.

The evidence at trial established that railroad employees commenced a search for Bailey somewhere between 12:15 and 12:30 P.M., nearly three hours after the accident. A search party that had proceeded along the small road adjacent to the track discovered Bailey between the first and second crossings at approximately 12:45 P.M. It was not until 2:00 P.M., however, that the rescuers were able to extricate Bailey and transport him to the hospital. The "crush injury" that Bailey sustained during the approximately four and one-half hours he was pinned underneath the brush cutter resulted in his death four days later.

Eileen Bailey commenced suit against CNR under the FELA, claiming that the railroad was liable to Bailey's estate for negligently causing his death.[2] Although a jury

2. Appellant contends that her husband was an employee of Grand Trunk Lines New England ("GTL"), alleged to be a wholly-owned

trial was requested, CNR moved to strike the jury demand, arguing that the FSIA precluded a trial by jury against an instrumentality of a foreign state. *See* 28 U.S.C. §§ 1330, 1603. Judge Billings granted CNR's motion, 609 F. Supp. at 52, and the case then was tried to the court. In an unreported decision dated June 28, 1985, Judge Billings rejected each of appellant's claims and found that CNR had not been negligent.

For the reasons set forth below, we affirm the district court's order denying appellant a jury trial, vacate the court's finding that CNR was not negligent, and remand for further proceedings.

II. DISCUSSION

A. *Jury Trial*

In striking plaintiff's demand for a jury, the district court properly determined that the FSIA provides the exclusive source of federal jurisdiction in actions against foreign sovereigns or their instrumentalities. *See* 28 U.S.C. §§ 1330(a), 1602-1611; *Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872 (2d Cir. 1981). Since that statutory scheme expressly forecloses the right to a jury trial, we need only determine whether Judge Billings correctly found CNR to be an instrumentality of Canada.

The FSIA defines an "agency or instrumentality of a foreign state" as any entity

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United States subsidiary of defendant CNR. CNR, however, which is incorporated in Canada, maintains that it employed Bailey. We need not resolve this particular dispute, since CNR was the only defendant ever to enter an appearance in this action. Indeed, appellant did not object to GTL's absence and did not seek a default judgment against any other party named in the complaint.

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). Appellant concedes that CNR satisfies the first and second elements of section 1603(b), but maintains that CNR is a citizen of a state of the United States, and therefore not an instrumentality of Canada, *see* 28 U.S.C. § 1603(b)(3). We disagree.

The citizenship of CNR must be determined in accordance with 28 U.S.C. § 1332(c), which provides that "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . ." It is undisputed that CNR is a Canadian corporation. Although it is undisputed also that CNR maintains its *worldwide* principal place of business in Canada, appellant urges that we look instead to CNR's principal place of business *within* the United States. We decline to do so. Such an approach ignores the plain meaning of the concept of a *principal* place of business and is at odds with the overwhelming consensus of authority that a corporation may have only one principal place of business. *E.g.*, *United States Fidelity & Guaranty Co. v. DiMassa*, 561 F. Supp. 348, 351 n.8 (E.D. Pa. 1983), *aff'd mem.*, 734 F.2d 3 (3rd Cir. 1984); *Woodbridge Plastics, Inc. v. Borden, Inc.*, 473 F. Supp.

218, 223 (S.D.N.Y.), *aff'd mem.*, 614 F.2d 1293 (2d Cir. 1979); 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3624, at 611 (1984); 1 J. Moore, *Moore's Federal Practice* ¶ 0.77[3.-1], at 717.60 (1986). Those courts considering this question consistently have held that an alien corporation's *worldwide* principal place of business, and not its principal place of business within the United States, is controlling. *E.g.*, *Arab International Bank & Trust Co. v. National Westminster Bank, Ltd.*, 463 F. Supp. 1145, 1147 (S.D.N.Y. 1979); *Eisenberg v. Commercial Union Assurance Co.*, 189 F. Supp. 500, 502 (S.D.N.Y. 1960); *see, e.g.*, *Salomon Englander y CIA, Ltda v. Israel Discount Bank, Ltd.*, 494 F. Supp. 914, 916-18 (S.D.N.Y. 1980).

Since CNR is a Canadian corporation with its principal place of business in Canada, it is not a citizen of a state of the United States and therefore is entitled to the protections afforded by the FSIA.

Having concluded that application of the FSIA required this action to be tried to the court, we need address only briefly appellant's remaining jury trial claims. First, we reject appellant's contention that the FELA entitled her to a trial by jury. The law is clear that in actions brought against foreign states, the FSIA displaces certain rights which otherwise inhere in a plaintiff's statutory or common law cause of action.[3] More specifically, we ex-

3. We note that, contrary to appellant's contention, the FELA does *not* expressly provide a right to a jury trial. Indeed, the Supreme Court's decision in *Bailey v. Central Vermont Railway*, 319 U.S. 350, 354 (1943), indicated that the right to a jury trial in an FELA action is only implied, not expressly mandated. *See* 5 J. Moore, *Moore's Federal Practice* ¶ 38.12[6], at 38-125 (1985) (the right to a jury trial in an FELA action is inferred "more obliquely than directly"). We therefore are not confronted with a case in which the limitations of the FSIA are in direct conflict with rights expressly conferred by another federal statute.

pressly have held that the FSIA strips a plaintiff of an otherwise valid entitlement to a jury trial. *Ruggiero*, 639 F.2d at 875-78. Other circuits uniformly have reached the same conclusion. *Arango v. Guzman Travel Advisors*, 761 F.2d 1527, 1532-33 (11th Cir.), *cert. denied*, 106 S. Ct. 408 (1985); *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 423 (5th Cir. 1982); *Rex v. Cia. Peruana de Vapores, S.A.*, 660 F.2d 61, 63-64 (3rd Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 880-81 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982); *see McKeel v. Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983), *cert. denied*, 469 U.S. 880 (1984).

Second, we disagree with appellant's claim that CNR has waived its right to a nonjury trial pursuant to 28 U.S.C. § 1605(a)(1) ("A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which the foreign state has waived its immunity either explicitly or by implication . . . ."). Although CNR has waived its immunity from suit in the United States by virture of its commercial activities, *see* 28 U.S.C. § 1605(a)(2), it remains amenable to suit in our courts only to the extent permitted by, and in accordance with the express terms of, the FSIA.

Finally, there is no merit to appellant's contention that the FSIA's prohibition of jury trials offends her rights under the seventh amendment. Since suits against foreign sovereigns were not permitted at common law, no right to a jury trial in such cases may be found to have attached. *Arango*, 761 F.2d at 1534; *Goar*, 688 F.2d at 424-28; *Rex*, 660 F.2d at 65-69; *Williams*, 653 F.2d at 881-83; *Ruggiero*, 639 F.2d at 878-81.

Appendix "A"—Decision of the United States Court of Appeals for the Second Circuit, Docket No. 85-7583, entered November 19, 1986.

B. *CNR's Negligence*

Appellant's complaint alleged that CNR was liable under the FELA because it was negligent in: (1) failing to train Bailey adequately; (2) allowing the brush cutter to fall into a hazardous condition; (3) failing to maintain the track properly; (4) failing to follow its own safety rule; and (5) failing to take reasonable search and rescue steps. After trial, the district court rejected each claim and rendered a verdict in favor of CNR.

In reviewing the district court's determination that CNR was not negligent, we are guided by an extremely narrow standard: we may set aside its factual findings only if clearly erroneous. Fed. R. Civ. P. 52(a); *Anderson v. Bessemer City*, 105 S. Ct. 1504, 1512 (1985).

Under the FELA, a railroad engaged in interstate commerce is liable to any employee who, during the course of his employment with the railroad, suffers "an injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees" of the railroad. 45 U.S.C. § 51; *see Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 507 (1957); *Miller v. Erie Lackawanna Railway*, 645 F.2d 140, 144 (2d Cir. 1981). In order to recover, "the plaintiff must prove that the railroad, with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury. The defendant's duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances." *Davis v. Burlington Northern, Inc.*, 541 F.2d 182, 185 (8th Cir.) (citations omitted), *cert. denied*, 429 U.S. 1002 (1976).

We find no error in Judge Billings' conclusion that CNR was not negligent in instructing Bailey on the

operation of the brush cutter. The evidence at trial established that during the course of his employment, Bailey had received extensive, hands-on training from a CNR supervisor. Indeed, Reindeau testified that he and Bailey knew "every bolt" of the machine, and that together they had operated the brush cutter approximately twenty-six times without incident. In light of these facts, it can hardly be said that CNR breached its duty to provide Bailey with proper training.

With respect to the remaining theories of negligence,[4] however, we are unable to agree with Judge Billings' legal analysis and therefore vacate the judgment and remand for further proceedings.

Our concern is with the district court's treatment of appellant's last two claims of negligence, *viz.*, that CNR failed to follow its own safety rule and that it failed to undertake adequate search and rescue efforts. Judge Billings correctly noted that a "railroad has a duty to establish safety rules for the guidance and protection of its employees and, once promulgated, the employee is generally entitled to rely on these safety rules as the appropriate standard of conduct." Slip op. at 16 (citing *Ybarra v. Burlington Northern, Inc.*, 689 F.2d 147 (8th Cir. 1982)). He went on to conclude, however, that where those rules "have been nullified by custom and practice, an employee is not justified in relying on them." Slip op. at 16 (citing *Wilson v. Norfolk & Western Railway*, 440 N.E.2d 238, 248 (Ill. App. Ct. 1982)).

The safety rule at issue here required that whenever maintenance equipment was being used, "two employees

4. On appeal, appellant has abandoned her claims regarding the maintenance of the track and the brush cutter. Accordingly, we do not address these theories of liability.

. . . must accompany the [track] unit." Defendant's Pretrial Memorandum and Contentions of Fact and Law at 17. Although appellant failed to establish at trial the precise language of the rule, the parties seem to have accepted Judge Billings' paraphrase—that two men must "work together." In finding that CNR was not negligent with respect to the rule, Judge Billings first reasoned that it was the custom and practice among CNR employees to have one worker operate the equipment on the track while the other traveled along the highway to flag his colleague at various crossings. Judge Billings then *assumed* that this particular practice violated CNR's rule, but concluded that such a violation was "not probative of negligence because of [CNR's] employees' established pattern of violation." Slip op. at 17.

With respect to the adequacy of search and rescue efforts, Judge Billings found no evidence upon which to conclude that CNR had deviated from a standard of reasonableness. This finding necessarily was related to the holding that CNR was not negligent in respect of its safety rule; that is, the delay in undertaking rescue efforts was reasonable only because it was found that Bailey and Reindeau were not required to work together. Obviously, if Bailey and Reindeau had been in closer contact, rescue efforts could have been more immediate.

We reject the view that an employer necessarily avoids liability for violation of its own safety rule by establishing that the rule has been nullified by the custom and practice of the employees for whose benefit it was designed. Judge Billings erroneously endorsed this view because he combined two distinct issues: negligence arising from CNR's specific failure to enforce its own safety rule and negli-

gence arising from CNR's more general failure to exercise reasonable care.

Judge Billings correctly assessed the former question. An employer's duty to adhere to a company safety rule may cease to exist if the rule has been effectively repealed by non-enforcement over a substantial period of time. In these circumstances, employees are not justified in relying on the rule, and the failure to observe it does not itself constitute negligence on the part of the employer, *Wilson v. Norfolk & Western Railway*, 440 N.E.2d 238, 248 (Ill. App. Ct. 1982), or contributory negligence on the part of the employee, *Hudson v. Seaboard Air Line Railway*, 176 N.C. 488, 97 S.E. 388 (1923); *Louisville & Northern Railroad v. Payne's Adm'r*, 117 Ky. 462, 197 S.W. 928 (1917).

What Judge Billings did not recognize, however, is that the conduct required by a safety rule that has been repealed, formally or by prolonged non-enforcement, may still be an ingredient of the general standard of reasonable care that the employer always owes to its employees. Though an abrogated safety rule would not itself constitute the legal standard of care, it may provide evidence of what procedures may or may not be feasible or of practical value. *See Ybarra*, 689 F.2d at 150 (jury entitled to consider whether railroad's customary failure to enforce safety rule constituted negligence). An employer may be liable for its employees' injuries even in, and perhaps because of, the absence of a safety rule.

If Judge Billings finds that CNR was negligent, he must then determine whether its negligence "played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers*, 352 U.S. at 506.

Also to be determined is whether Bailey was contributorily negligent, and if so, to what extent any ultimate recovery should be reduced. *See* 45 U.S.C. § 53 (1982); *Meyers v. Union Pacific Railroad*, 738 F.2d 328, 330 (8th Cir. 1984).

III. CONCLUSION

For the reasons set forth above, the order striking appellant's demand for a jury trial is affirmed. The judgment entered in favor of CNR is vacated and the matter is remanded for further proceedings consistent with this opinion.

VAN GRAAFEILAND, *Circuit Judge*, concurring in part and dissenting in part:

I agree with my colleagues that this case must be returned to the district court. In view of the greatly expanded concept of negligence under the Federal Employers Liability Act, 45 U.S.C. §§ 51-60, I find it difficult to understand how Mrs. Bailey could be denied all recovery, even for the three hours of pain and suffering her husband endured while lying under the overturned brush cutter calling vainly for help. *See Dellaripa v. New York, N.H. & H. R.R.*, 257 F.2d 733, 734 (2d Cir. 1958). However, I respectfully disagree with the majority's denial of Mrs. Bailey's right to a jury trial, a right which the FELA guarantees the widow of every employee of a common carrier by railroad in the United States who is fatally injured while working in interstate commerce.

Appendix "A"—Decision of the United States Court of Appeals for the Second Circuit, Docket No. 85-7583, entered November 19, 1986.

Because every Congress correctly has believed that a uniform regulatory scheme is needed for the operation of a national rail system, railroads in this Country have been subject to comprehensive federal regulation for almost a century. *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 687-88 (1982). The need for such uniformity requires that all interstate railroads, regardless of their ownership, be subject to the same regulatory provisions. *See California v. Taylor*, 353 U.S. 553, 562 (1957); *United States v. California*, 297 U.S. 175, 188 (1936).

With this end in mind, Congress made the century-old Interstate Commerce Act applicable to all carriers engaged in transportation to or from a foreign country "insofar as such transportation takes place within the United States." 49 U.S.C. § 1(1)(c), now in substance 49 U.S.C. § 10501(a)(2); 1 Roberts, *Federal Liabilities of Carriers* § 138 at 387 (2d ed. 1929). "Such transportation must be regulated by this country if it is to be effectively regulated." *United States v. Pennsylvania R.R.*, 323 U.S. 612, 622 (1945).

Insofar as Canadian National's activites in the United States are concerned, it always has been within the scope of this statute. For example, a cursory scan of Interstate Commerce Commission reports for the decade between 1930 and 1940 discloses at least ten cases in which Canadian National was a party to Commission proceedings.[1] *See also H.K. Porter Co. v. Central Vermont Ry.*,

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[1] *Restigouche Co. v. Canadian National Ry.*, 238 ICC 528 (No. 28385, May 16, 1940); *Alms & Doepke Co. v. Canadian National Ry.*, 237 ICC 117 (No. 28171, January 10, 1940); *California Fruit Exchange v. Canadian National Ry.*, 222 ICC 31 (No. 27501, April 15, 1937); *O. & W. Thum Co. v. Canadian National Ry.*, 215 ICC 341 (No. 27095, April 16, 1936); *Pooling Passenger-Train Revenues And Service-Matter Application of Canadian National Ry., et al.*, 201 ICC 699 (No. 26531,

366 U.S. 272 (1961), in which the Supreme Court upheld the jurisdiction of the Commission to regulate transportation practices of Canadian National within the United States.

Of course, the Commission's orders would have little effect if they could not be enforced. Accordingly, long before the State Department's 1952 "Tate Letter", 26 Dep't State Bull. 984, differentiating between sovereign acts and commercial activities of foreign governments, Congress provided for such enforcement through actions against all railroad interstate commerce carriers in the district courts. *See, e.g.*, 49 U.S.C. §§ 9, 16(2)(9)(10)(12). These sections have been repealed, revised and recodified in chapter 117 of Title 49, which was enacted long after the Foreign Sovereign Immunities Act went into effect. Every carrier subject to chapter 1 of the Interstate Commerce Act is required to designate an agent in the District of Columbia upon whom service of notices and processes may be made. 49 U.S.C. § 50, now in substance 49 U.S.C. §§ 10329 and 10330. Section 11705(b)(2) provides that a common carrier providing transportation subject to the jurisdiction of the Commission "is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle;" *i.e.*, a Commission-related violation. Section 11705(d)(2) provides that all carriers that are parties to a Commission order awarding damages may be joined as defendants in a civil action

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June 25, 1934); *Twomey-Williams Co. v. Canadian National Rys.*, 195 ICC 177 (No. 25360, July 5, 1933); *Nichols & Cox Lumber Co. v. Canadian National Rys.*, 191 ICC 503 (No. 25098, February 25, 1933); *Pet Milk Co. v. Canadian National Ry.*, 178 ICC 468 (No. 24170, September 14, 1931); *Amsden v. Canadian National Rys.*, 176 ICC 259 (No. 22611, May 26, 1931); *Iroquois Pulp & Paper Co. v. Canadian National Rys.*, 169 ICC 226 (No. 21902, November 14, 1930).

brought in a district court of the United States and that a judgment ordering recovery may be made against the defendant found to be liable to the plaintiff. *See Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 905 (1982), in which judgment was awarded against Canadian National and other railroads for overcharges.

Finally, the Act provides for both civil and criminal penalties imposed upon both carriers and employees, *see, e.g.*, 49 U.S.C. §§ 1(7)(12)(20)(21) and 41, now in substance chapter 119 of Title 49, and provision is made for trial in the district courts. *See* sections 11901(*l*)(1); 11903(d); 11904(c)(3).

Of course, the ICC is not directly involved in the instant case. The foregoing discussion is simply illustrative of the unwavering congressional intent that all railroad common carriers in the United States be regulated in like manner. Every regulatory enactment by Congress has been applied broadly and uniformly. For example, every common carrier engaged in interstate commerce by railroad is subject to the provisions of the Safety Appliance and Boiler Inspection Acts, and penalties for violation of these Acts may be recovered in suits brought by United States attorneys in district courts. 45 U.S.C. §§ 6, 13, 34. *See California v. Taylor, supra*, 353 U.S. at 562. The Ash Pan Act of 1908, 45 U.S.C. §§ 17-21, since repealed, made it unlawful for "any common carrier engaged in interstate or foreign commerce by railroad" to use a locomotive not equipped with a proper ash pan. *Id.* § 17. Any carrier violating the statute was made subject to a penalty to be recovered by the United States attorney "in the district court of the United States having jurisdiction in the locality where such violation shall have been

committed." *Id.* § 18. The Railroad Hours of Service Law, 45 U.S.C. §§ 61-64(b), enacted in 1907, applied to interstate carriers and carriers operating "from any place in the United States to an adjacent foreign country." *Id.* § 61(a). As amended in 1976, it applies to "any common carrier engaged in interstate or foreign commerce by railroad." Violations of the Act subject carriers to a penalty of $500 "to be recovered in an action to be brought by the United States attorney in the district court of the United States for the judicial district in which such violation occurred or in which the defendant has its principal executive office." *Id.* § 64a(a). The Accident Reports Act of 1910 requires that every common carrier engaged in interstate commerce by rail file monthly reports of accidents with the Secretary of Transportation and makes the carrier guilty of a misdemeanor if it fails to do so. 45 U.S.C. §§ 38, 39. See also the Railway Labor Act, 45 U.S.C. §§ 151-163, which applies to "any . . . carrier by railroad, subject to the Interstate Commerce Act," *id.* § 151 First; *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 688 (1982), and provides for penalties collectible through actions by United States attorneys, *id.* § 152 Tenth.

Finally, in 1970, Congress enacted the Railroad Safety Act, 45 U.S.C. §§ 421-441, which empowers the Secretary of Transportation to prescribe rules, standards, etc. "for all areas of railroad safety." *Id.* § 431(a). Congress declared its intent that "laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable." *Id.* § 434. A review of the legislative history accompanying this Act and its amendments makes only too clear the need for comprehensive and uniform regulation of all railroads. *See* 1970

U.S. Code Cong. & Ad. News 4104-4132; 1976 U.S. Code Cong. & Ad. News 1534-1554; 1978 U.S. Code Cong. & Ad. News 5499-5517. Information contained in these congressional reports shows, for example, that, between 1966 and 1974 "train-caused train accidents per ton mile increased by more than 100 percent." *Id.* at 5514. Apropos of the instant suit which involves a derailment, the 1978 report discloses that "track is not only the largest but also the most rapidly increasing contributing cause of train accidents." *Id.* at 5502. It is not surprising, therefore, that Congress intended the term "railroad" to include all railroads and not be "limited to the confines of 'common carrier by railroad' as that language is defined in the Interstate Commerce Act." 1970 U.S. Code, *supra*, at 4114. The Railroad Safety Act makes it unlawful for "any railroad" to disobey the rules, standards, etc. prescribed by the Secretary of Transportation, 45 U.S.C. § 438, and provides for enforcement in actions brought in the United States district courts. *Id.* § 439. The Act also provides that the rules, standards, etc. promulgated thereunder shall have "the same force and effect as a statute" in actions brought under the Employers' Liability Act. *Id.* § 437(c).

With the foregoing as a background, we turn now to the provisions of the FELA, the statute involved in the instant case. This statute, enacted in 1908, makes "[e]very common carrier by railroad while engaging in commerce between any of the several States . . . or any of the States . . . and any foreign nation . . . liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part . . . [from the carrier's negligence]." 45 U.S.C. § 51. It provides further that any

employee of a carrier employed in such commerce "shall be considered as entitled to the benefits of [the Act]." This statute was intended to be "all-inclusive" and to apply alike to public and privately owned railroads. *California v. Taylor, supra*, 353 U.S. at 563-64. It is an Act regulating commerce within the meaning of 28 U.S.C. § 1337, so as to give federal courts jurisdiction to enforce its provisions. *Imm v. Union R.R.*, 289 F.2d 858 (3d Cir.), *cert. denied*, 368 U.S. 833 (1961); *see Fox v. Consolidated Rail Corp.*, 739 F.2d 929, 932-33 (3d Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985); *Finnerty v. Cowen*, 508 F.2d 979, 983-84 (2d Cir. 1974).

During the early years of the FELA's existence, the tendency of lower courts was to treat section 51 as if it simply incorporated the concepts of common law negligence. However, the Supreme Court unequivocally held that those courts were misinterpreting the statute. In case after case, the Supreme Court rejected decisions of lower courts which either took an FELA case from the jury or set aside a jury verdict. *See Wilkerson v. McCarthy*, 336 U.S. 53, 71-72 (1949) (Douglas, J., concurring). The FELA, said the Court, is "an avowed departure from the rules of the common law." *Sinkler v. Missouri Pacific R.R.*, 356 U.S. 326, 329 (1958). It provides injured employees with a "statutory negligence action that [is] significantly different from the ordinary common-law negligence action." *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, 509-10 (1957). *See also Shepard v. New York, N.H. & H. R.R.*, 300 F.2d 129, 130 (2d Cir. 1962).

Most importantly for purposes of the instant case, the Supreme Court, and this Court as well, have held consistently that the jury trial "is part and parcel of the remedy

afforded railroad workers under the Employers Liability Act." *Schulz v. Pennsylvania R.R.*, 350 U.S. 523, 524 (1956); *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360 (1962); *Johannessen v. Gulf Trading & Transp. Co.*, 633 F.2d 653, 656 (2d Cir. 1980). "Congress intended the Act to be remedial legislation . . . and under it 'trial by jury is part of the remedy.' " *Eggert v. Norfolk & W. Ry.*, 538 F.2d 509, 511 (2d Cir. 1976) (*quoting Ellerman, supra*, 369 U.S. at 360).

"This wider availability of jury determinations in FELA cases is consistent with Congress' desire 'to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations.' " *Mendoza v. Southern Pacific Transp. Co.*, 733 F.2d 631, 633 (9th Cir. 1984) (*quoting Wilkerson v. McCarthy, supra*, 336 U.S. at 68). Unlike my colleagues, I do not believe that Congress intended to relieve Canadian National Railway of this cost in the case of Jeffrey Bailey.

Canadian National is a common carrier in both the United States and Canada. *Canadian National Ry. v. United States, supra*, 425 F. Supp. at 292. The limited facilities available for my review of Canadian law satisfy me that a plaintiff suing Canadian National in its own country would be entitled as of right to a jury trial. Section 44(3) of the Canadian National Railways Act, 1955 Can. Stat. 133, 147, provides:

> Any court having under the statutes or laws relating thereto jurisdiction to deal with any cause of action, suit or other proceeding, when arising between private parties shall, with respect to any similar cause of action, suit or other proceeding by or

against the National Company, be a court of competent jurisdiction under the provisions of this section.

In *Carpenter v. Canadian National Ry.*, [1955] 3 D.L.R. 492, Chief Judge Walsh, writing for the Newfoundland Supreme Court, cited three Canadian cases which, he said, held "that a person taking action against the C.N.R. for damages resulting from the negligence of a servant of the Company is entitled to have trial by jury." *Id.* at 494. He concluded:

> I consider that the *Canadian National Railways Act* creates the Company as a legal entity separate and distinct from the Crown, and not as an agent of Her Majesty, for the operation and management of all railways controlled by, entrusted to, or constructed by, the Company, and authorizes actions by and against the Company in Courts of competent jurisdiction, as one of the powers incidental to its corporate capacity. In respect of the operation of railways vested in the Crown, the Act makes available to the Company any defence to an action that would be available to Her Majesty, if she were a party to the action. I consider, therefore, that the defendant is not an agency of the Crown within the meaning of s.23 of the *Crown Liability Act*.

Id. at 496. *See also Michaud v. Canadian National Ry., [1924]*, 3 D.L.R. 1.

In 1970, Canadian National formed a wholly-owned subsidiary, Grand Trunk Corporation, under the laws of Delaware, for the purpose of consolidating Canadian National's extensive interests in the United States railroad industry. Grand Trunk acquired Central Vermont Railway

in 1971 and is its sole shareholder.[2] Although there is some indication in the record that Jeffrey Bailey was paid by Central Vermont Railway, Canadian National "concedes" that Bailey was employed by it. On the basis of this concession, Canadian National argues that Bailey's widow must be deprived of "part and parcel of the remedy" afforded by the FELA to all other railroad workers in the United States and their widows. This, I believe, would surprise those members of Congress who are familiar with the salutary purposes underlying the enactment of the FELA. *See Parden v. Terminal R.R.*, 377 U.S. 184, 197 (1964).

Canadian National admits, as it must, that "it is subject to all U.S. rules and regulations for its U.S. rail operations." Appellees' Brief at 13. These rules and regulations, as contained in the Interstate Commerce Act, the Safety Appliance Act, the Boiler Inspection Act, the Hours of Labor Law, the Railroad Safety Act, and the FELA, were designed to regulate the activities of all railroad common carriers in the United States and to protect and benefit their employees. I suggest that, if Congress had intended to take from those employees the remedy of a jury trial, it would have said so specifically. "Sovereign immunity is a derogation from the normal exercise of jurisdiction by the courts and should be

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2 Appellant's trial counsel erroneously told the district court that "The Canadian National Railroad or the Grand Trunk Line was originally a St. Lawrence Railroad that was bought by the Grand Trunk Lines who was later bought by Canadian National." App. 119. In this court, counsel takes the position that the "Grand Trunk Lines New England" named in the complaint is the same company as Grand Trunk Corporation, the Delaware holding company. In any event, the district court "assume[d] that, as a wholly-owned subsidiary of Canadian National, Grand Trunk Lines falls under the auspices of Canadian National for litigation purposes."

accorded only in clear cases." *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 366 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

Canadian National is no stranger to jury trials in United States courts. *See, e.g., Taylor v. Canadian National Ry.*, 301 F.2d 1 (2d Cir.), *cert. denied*, 370 U.S. 938 (1962); *Canadian National Ry. v. Conley*, 226 F.2d 451 (1st Cir. 1955); *Jock v. Canadian National Ry.*, 552 F. Supp. 458 (N.D.N.Y. 1982); *Bonney v. Canadian National Ry.*, 100 F.R.D. 388 (D. Me. 1983); *Supples v. Canadian National Ry.*, 53 A.D.2d 1017 (1976) (*mem.*). All of these cases proceeded just as if they were being brought in Canada itself—no one contended that the plaintiffs were suing the Canadian government. I suggest that Mrs. Bailey is not suing the Canadian government in the instant case. She is suing a United States common carrier, seeking relief that is "part and parcel" of the remedy that Congress has made available to widows of common carrier employees under the FELA.[3]

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[3] Because Canadian National, directly or through wholly-owned subsidiaries, has well over 4000 employees in the United States, our decision in this case should be a matter of some concern to those employees and the Brotherhoods that represent them.

APPENDIX "B"

Decision of the United States District Court for the District of Vermont, Civil Docket No. 83-290, entered December 10, 1984

U.S. District Court
District of Vermont
Filed
12-10-84
By RER
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Civil Docket No. 83-290

EILEEN BAILEY, Administrator of the
Estate of JEFFREY W. BAILEY,

v.

GRAND TRUNK LINES NEW ENGLAND,
CANADIAN NATIONAL RAILWAY,
MIDLAND DIVISION, ST. LAWRENCE REGION.

MEMORANDUM OF DECISION

This matter is presently before the Court on Defendant Canadian National Railway's Motion to Strike Jury Demand. The motion, together with a supporting

memorandum of law, was filed on August 2, 1984. The defendant also filed an affidavit in support of its motion attesting to the jurisdictional facts underlying its claim that the jury demand must be striken. That affidavit was filed on August 9, 1984. On October 12, 1984, Plaintiff Eileen Bailey filed a memorandum of law in opposition to Defendant's motion, together with an answering affidavit. The hearing on Defendant's motion was held on October 15, 1984, after which the parties each forwarded correspondence to the Court supplementing their arguments and earlier motion papers.

BACKGROUND

Plaintiff Eileen Bailey is the Administratrix of the Estate of Jeffrey W. Bailey. The decedent was employed by Defendant as a maintenance-of-way worker. On or about June 3, 1983, Plaintiff's decedent was operating a brush cutting machine which malfunctioned and derailed, causing Plaintiff's decendent injury and, ultimately, death.

Plaintiff brings this cause of action against Defendant under the Federal Employers' Liability Act (FELA) claiming that her decedent's injuries were caused by Defendant's negligence. Specifically, Plaintiff claims the defendant failed to provide Plaintiff's decedent with safe working conditions.

In her Complaint, Plaintiff named Grand Trunk Lines New England and Canadian National Railway as defendants. However, Canadian National was the only defendant to enter an appearance in the case. Though the

record does not explicitly bear it out, the Court assumes that, a wholly owned subsidiary of Canadian National, Grand Trunk Lines falls under the auspices of Canadian National for litigation purposes. *See Affidavit in Support of Motion to Strike Jury Demand,* Schedule C at p.8. The case has proceeded on this basis without objection from Plaintiff.

Along with her Complaint, Plaintiff filed a demand for trial by jury.

DISCUSSION

Defendant has moved to strike Plaintiff's jury demand on the ground that, pursuant to the Foreign Sovereign Immunities Act (FSIA) 20 U.S.C. §§1330 and 1602 et seq., this Court has jurisdiction over the Defendant only to the extent that the claims against it are tried by the Court sitting alone without a jury. Plaintiff, on the other hand, argues that Canadian National and its subsidiary, Grand Trunk Lines New England, are not instrumentalities of the Canadian government and, thus, the FSIA and its limiting jurisdictional rules do not apply in this case. Plaintiff also claims Defendants waived its right to strike the jury demand by filing its motion more than a year after the jury demand was filed. Finally, Plaintiff claims that FELA requires this case to be tried by a jury.

Ordinarily, foreign sovereigns are immune from the jurisdiction of United States courts. *Frolova v. Union of Soviet Socialist Republics,* 588 F. Supp. 358 (N.D. Ill. 1983). The FSIA codifies the general rule but sets forth

several significant exceptions which, if applicable, render a foreign state amenable to suit. The defendant concedes that, because its activities in the United States are commercial in nature, it falls into one of the exceptions contained in the act. *See* 28 U.S.C. §1605(a)(2). Defendant claims, however, that its immunity is barred only to the extent that the case is tried without a jury.

Under the FSIA, district courts have jurisdiction only to the extent permitted by 28 U.S.C. §1330. That section confers upon the district courts "original jurisdiction without regard to amount in controversy of any *nonjury* civil action against a foreign state as defined in section 1603(a) of this title. . . ." 28 U.S.C. §1330(a) (emphasis supplied). Failure to try the case by court is reversible error. *Houston v. Murmansk Shipping Co.*, 667 F.2d 1151, 1154-55 (4th Cir. 1982). Accordingly, where the complaint contains a request for a jury trial, and the court determines that FSIA applies, the "sensible practice is simply to strike the jury demand." *Id.* at 1154. *See also Ruggiero v. Compania Pervana de Vapores*, 639 F.2d 872 (1981) (court sanctioned striking jury demand in case against foreign sovereign). Thus, it is clear that, if the FSIA applies, this case must be tried without a jury.

Whether the FSIA applies in this case depends upon whether Canadian National qualifies as a foreign state. Under FSIA, the terms "foreign state" includes "political subdivision[s] of a foreign state or an agency or instrumentality of a foreign state . . . ." 28 U.S.C. §1603(a). An "agency or instrumentality" is an entity which:

(1) is a separate legal, person, corporate or otherwise, *and*

(2) is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, *and*

(3) is neither a citizen of a state of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. §§1603(b)(emphasis supplied).

As to the first two prongs of the test set forth in §1603(b), there is no dispute. According to the Defendant's affidavit, Canadian National is a corporation organized under the laws of Canada and all its corporate stock is owned by Queen Elizabeth, the queen in right of Canada. *See Affidavit in Support of Motion to Strike Jury Demand,* Schedule C at p. 1. Plaintiff argues, however, that Canadian National is a citizen of a state of the United States and, thus, does not qualify as a instrumentality of a foreign state under the third prong of the §1603(b) test, quoted above.

Under 28 U.S.C. §1332(c), a corporation is deemed to be a citizen of any state by which it has been incorporated and of the state where it has its principal place of business. As Defendant's affidavit bears out, Canadian National is incorporated in Canada. *See Defendant's Affidavit, supra,* Schedule C at p. 2. And, though a corporation's principal place of business is ordinarily a question of fact, *see, e.g., Northeast Nuclear Energy Company v. General Electric Company,* 435 F.

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Supp. 344, 345 (D. Ct. 1977), it was conceded at the hearing that Canadian National's principal place of business is in Canada. Thus, there can be little doubt that Defendant Canadian National is not a citizen of a state of the United States within the meaning of 28 U.S.C. §1332(c), and thus qualifies as an instrumentality of a foreign state within the meaning of §1603(b).

Plaintiff claims, however, that Grand Trunk, a subsidiary of Defendant, is a corporation incorporated in, and with its principal place of business in, the United States. While there may be significant operations in the United States on the part of Canadian National's subsidiaries, a corporation has one and only one principal place of business which, in this case, is conceded to be in Canada. *See United States Fidelity & Guaranty Co. v. DiMassa*, 561 F. Supp. 348, 351 n. 8 (E.D. Pa. 1983). This is true even where subsidiaries are involved. *See Lancer Industries, Inc. v. American Insurance Company*, 197 F. Supp. 894 (W.D. La. 1961) (court found the principal place of business of a corporation that owned and controlled six subsidiary companies, all engaged in different manufacturing activities, spread among Mississippi, Louisiana and California to be in New York where all executive and management control was centered).

Plaintiff's claim that Defendant waived its right to have the jury demand striken is without merit. Under the FSIA, this Court does not have jurisdiction to try this case with a jury. *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 420 (5th Cir. 1982). As such,

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Defendant's motion to strike is akin to a claim that this Court lacks subject matter jurisdiction. Such claims may be raised at any point in the litigation or by the Court *sua sponte* Fed. R.Civ. P. 12(h)(3).

Plaintiff's final argument is that the Federal Employers' Liability Act (FELA), the act upon which her claims are premised, requires this case be tried with a jury. Plaintiff correctly points out that FELA provides for trial by jury and, further, that courts have avidly adhered to FELA's mandate. Nevertheless, this Court simply does not have jurisdiction to try this case with a jury. The purpose of the FSIA's nonjury jurisdictional prerequisite is to promote "uniformity in decision, which is desireable since a desparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 1487, 96th Cong., 2d Sess. 13, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6611. Plaintiff's argument is at odds with the intent behind the jurisdictional limits contained in the FSIA.

Accordingly, for the above-stated reasons, Plaintiff's jury demand must be striken.

We note in passing that this result does not interfere with Plaintiff's seventh amendment right to trial by jury. The scope of the right to trial by jury under the seventh amendment is determined by application of an historical test, which requires jury trial only of issues that, viewed in context, would have been tried by a jury in 1791. The law in 1791 did not allow *any* actions, with or without a jury, against a sovereign. Based upon this

reasoning, at least two circuit courts have held that the FSIA's proscription against jury trials does not violate the seventh amendment. *See Goar, supra*, 688 F.2d at 424; *Ruggiero, supra*, 639 F.2d at 878-81.

ORDER

It is hereby ORDERED that Defendant's Motion to Strike Jury Demand is Granted.

Dated at Montpelier, in the District of Vermont, this 7th day of December, 1984.

FRANKLIN S. BILLINGS, JR.
Franklin S. Billings, Jr.
District Judge

APPENDIX "C"

Findings of Fact, Conclusions of Law and Order of the United States District Court for the District of Vermont, Civil Docket No. 83-290, entered June 28, 1985

U.S. District Court
District of VT
Filed
Jun 28 9:44 AM '85
Clerk
By CR
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Civil Action No. 83-290

EILEEN BAILEY, Administratrix of the Estate of JEFFREY BAILEY,

vs.

GRAND TRUNK LINES-NEW ENGLAND, CANADIAN NATIONAL RAILWAY, MIDLAND DIVISION, ST. LAWRENCE REGION.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

INTRODUCTION

The plaintiff, being the widow and Administratrix of the Estate of Jeffrey Bailey, brings this cause of action under the Federal Employers' Liability Act (FELA), 45

Appendix "C"—Findings of Fact, Conclusions of Law and Order of the United States District Court for the District of Vermont, Civil Docket No. 83-290, entered June 28, 1985.

U.S.C. §51, *et seq.*, against defendant Canadian National Railway, plaintiff's decedent's employer. Plaintiff alleges that the decedent was employed as a machine operator by the defendant's wholly owned subsidiary, Grand Trunk Lines-New England, and that, on June 3, 1983, decedent was operating a track brush cutter on the railroad near Stark, New Hampshire, when it derailed, traveling off the track for a distance, and then turned over, pinning decedent under the machine, causing him serious injuries, pain and suffering and ultimately causing his death on June 7, 1983.

The plaintiff alleges that the accident and resulting injuries and death were caused by defendant's negligence in that defendant: 1) failed to properly train decedent to operate the brush cutter; 2) negligently allowed the brush cutter to fall into a hazardous condition; 3) failed to properly maintain the track; 4) negligently failed to follow its own rules and regulations with regard to the operation of equipment on the track; and 5) failed to take reasonable steps to rescue plaintiff's decedent after the accident. The defendant denies each of these claims and further alleges that plaintiff's decedent's own negligence was the cause of the accident and was greater than defendant's negligence, if any.

The matter was tried by Court, in view of the provisions of the Foreign Sovereign Immunities Act (FSIA), 20 U.S.C. §§1330 and 1602, *et seq.*, and pursuant to the decision of this Court filed December 10, 1984.

Appendix "C"—Findings of Fact, Conclusions of Law and Order of the United States District Court for the District of Vermont, Civil Docket No. 83-290, entered June 28, 1985.

FINDINGS OF FACT

Plaintiff's decedent was first employed by the defendant in 1972 and had operated the brush cutter since March of 1983, together with another railroad employee, Ronald Riendéau. The brush cutter had been operated in Quebec from 1973 to March of 1983 and, during that period, it was in good, workable condition, except for normal maintenance.

The brush cutter had four rubber wheels and could be operated in four wheel, as well as two wheel, drive. The center of gravity of the brush cutter was located midway between the rubber wheels and 4½ feet above the rails. The brush cutter was designed to be operated both on the track and on the highway. The steering propulsion and brakes, whether on the highway or on the track, were controlled by the rubber wheels. For on-track operation, the brush cutter was outfitted with four flanged steel wheels, known as "hi-rails", which are operated through cylinders and a hydraulic system. While operating on the track, 500 pounds of pressure per square inch are exerted on the front hi-rails and 1,000 pounds of pressure are pumped into the rear hi-rails. While on the track, the rubber wheels run on the top of the rails and the flanged hi-rails run on the track.

While operating on the track, the brush cutter's steering mechanism had to be locked in place. On this machine, there were two locking devices. One locking device was operated by a key located in front of the operator which, if turned in a clockwise direction, would lock the rubber wheels in place and simultaneously

disengage the clutch. The key was to be in the locked position for on-track travel, whereas turning the key in a counter-clockwise direction would engage the steering mechanism for highway travel. The other locking device was a mechanical yoke that fit over the steering wheel which likewise would prevent the rubber wheels from turning while on the track. This device had to be positioned manually and at no time did or could the system disengage unless this yoke were removed manually. The brush cutter could operate on the rails even if the key was in an unlocked position. In that event, the operator could turn the wheels on the track if he removed the manual yoke. The brush cutter had a wheel base of 102 inches.

The brush cutter was brought to the United States, specifically to Island Pond, Vermont, in March of 1983, after having been overhauled in the maintenance factory in Quebec. During the Spring of 1983, the mechanics continued regular maintenance and, in addition, there were at least two occasions when electrical problems developed but, in both instances, repairs were made before June 3rd, the date of the accident. One such occasion occurred on June 1, 1983, when a bare wire was discovered behind the operator's seat, which caused a shorting out of the electrical system. This, however, had no effect on the steering and the traveling brake systems. As of June 3, 1983, the brush cutter was in good working condition.

After the brush cutter was brought to the United States, a Canadian National supervisor, one Ranger, who was experienced with the operation of the brush cutter,

spent two and a half days with plaintiff's decedent and Riendeau, both co-operators of this particular brush cutter. Ranger instructed Bailey and Riendeau on the operation of the brush cutter, going over the operating manuals, all controls and gauges, as well as all the other operating parts of the machine. Ranger also instructed both men in the actual operation of the machine, allowing them to actually operate it on the rails. At the end of their instruction, both operators knew "every bolt" of the machine and, in addition, both individuals operated the machine up to the time of the accident for at least twenty-six days. After the accident, the machine was inspected by a series of employees, both in the United States and at the maintenance shop in Quebec, as well as by experts called by both parties to this litigation, and no defect was discovered that could cause derailment.

On the morning of June 3, 1983, both operators went to Berlin, New Hampshire, where the machine was parked. On that day, Riendeau actually drove the machine onto the tracks and positioned it thereon, putting down the hi-rails and inserting 500 pounds of pressure per square inch in the front cylinders and 1,000 pounds of pressure in the rear cylinders, as directed by the operating manual and by their instructor. After getting the machine on the tracks, Riendeau placed the mechanical yoke over the steering wheel in the cab. However, Riendeau does not recall whether, and the Court concludes there is insufficient evidence to find that, he turned the key to disengage the steering mechanism and clutch.

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When Bailey arrived, both operators, as was their custom, did a "walk around" of the machine, checking all the working parts. However, as the driver that day, it was Bailey's responsibility to check the inside of the cab, including both locking mechanisms. Although there is a Canadian National regulation which requires all operations involving track machines proceed with at least two men "working together", the credible evidence is that the custom among employees on the Berlin route was to have one man operating the machine on track with the other employee driving on the highway to flag crossings while keeping in contact with the on-track employee by means of radio communication.

After receiving a "line-up" from the radio operator and officials in Berlin, plaintiff's decedent proceeded to operate the brush cutter for travel on the track, while Riendeau went in his truck along the highway to West Milan, New Hampshire where he was to flag the crossing a mile point 109. While on the highway, Riendeau kept in contact with Bailey by means of a radio in his truck, although from time to time Riendeau lost radio contact with Bailey. By the time Riendeau reached the Milan crossing, Bailey had come to a full stop at the crossing and was waiting for Riendeau. That Bailey had come to a complete stop indicates, and the Court finds, that the brush cutter's brakes were in good working order on that day.

Riendeau then proceeded to mile point 117 in order to flag the crossing at Stark, New Hampshire, but when he got to that point there was no sign of Bailey. He then

proceeded to the Groveton, New Hampshire, point, believing that Bailey was ahead of him. He then, after waiting in Groveton for a period of time without any sign of the brush cutter, proceeded to Island Pond, Vermont, believing Bailey was still ahead of him. Riendeau arrived at Island Pond at approximately 10:30 a.m., but there was still no sign of Bailey. Believing Bailey was lost, Riendeau and two other Canadian National employees commenced a search for the brush cutter. In the meantime, the track patrol had been alerted and it also started to search for Bailey, coming from the opposite direction. At approximately 12:30 p.m., the brush cutter was found at mile point 113.65. It had derailed and flipped over on the bank near the river, with plaintiff's decedent pinned under the machine from his hips down. Riendeau immediately radioed for assistance. The Court finds that Riendeau and the other CN employees involved conducted a diligent search for Bailey.

Plaintiff's decedent was finally removed from the brush cutter, through means of cables and a wrecker by 2:00 p.m., approximately one and a half hours after he was located. Bailey was immediately taken to the Androscoggin Hospital in Berlin, New Hampshire, arriving at approximately 2:30 p.m. He was then moved to the Dartmouth-Hitchcock Medical Center in Hanover, New Hampshire, arriving at approximately 7:00 p.m. Although the decedent was conscious for a short period of time while at the Dartmouth-Hitchcock Medical Center, he never stated anything about the accident.

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Soon after discovery of the accident, a New Hampshire state trooper arrived at the scene, as a well as a wrecker with a driver, an ambulance with a driver, and several of defendant's employees, including the light maintenance foreman-track patrolman and track welder. The state police officer took a series of seven photographs of the scene, which are hereby found as facts (plaintiff's exhibit 2). Rubber marks were observed on the top and side of the rails and particularly on the left hand rail, going east. In addition, there were marks on the ties between the rails, made by the front hi-rails of the brush cutter, and extending in a left-hand direction, proceeding east, for a distance of 35 feet and, further, there were marks in the ballast, first veering away from the left-hand track and then arcing to the right to a point where two ends of the ties were cut off.

The tracks were inspected visually and measured on the day of the accident and had been so inspected many times prior thereto. The tracks were all in the proper tolerances, as governed by the Federal Railway Administration (FRA) as to alignment, level, ties, ballast and the track itself. There was a $^{3}/_{8}$" dip in the tracks discovered at a point in the track 360 feet east of the scene of the accident, but this was well within the FRA tolerance of 1¼ inches. From the credible evidence there was no defect found in the tracks at the scene which could have caused the derailment.

The evidence which plaintiff's expert relies on, in part, is a blown-up photograph of the track taken three days later at an angle (plaintiff's 49), which photograph the

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Court finds not credible as a proper representation of the scene at the time of the accident. The opinion offered by plaintiff's expert, a civil engineer, is not supported by credible evidence, since it is premised on the above-described photograph. To the extent that plaintiff's expert's opinion is premised on a so-called pumping tie and a 2" variation in 5' of track, we find the opinion unacceptable, as not based on credible evidence.

The Court further finds that, based on the credible evidence, the opinion of the defendant's expert engineer is plausible and that the cause of the accident was that the plaintiff's decedent steered the rubber wheels so that the brush cutter derailed and, further, that neither steering mechanism was in place at the time of the accident.

DISCUSSION

At the outset, we note that actions brought under FELA, 45 U.S.C. §51, *et seq.*, are governed by the federal decisional law of negligence, and not by the sometimes-divergent rules of negligence followed among the states. *Chicago & North Western Railway Co. v. Rieger*, 326 F.2d 329 (8th Cir.), *cert. denied*, 377 U.S. 917 (1964). Under the federal standard of negligence followed in FELA cases, plaintiff's burden is somewhat less onerous than in an ordinary negligence case; for a plaintiff may recover even if the railway was only "slightly" negligent. *Missouri-Kansas-Texas Railway Co. v. Hearson*, 422 F.2d 1037, 1040 (10th Cir. 1970).

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Nevertheless, under FELA, a railroad company is not an insurer for its employees, *O'Hara v. Long Island Railroad Company*, 665 F.2d 8, 9 (2d Cir. 1981), and the plaintiff still has the burden to prove the defendant's negligence, however slight, by the preponderance of the evidence. *Schroble v. Lehigh Valley Railway Co.*, 62 F.2d 993 (2d Cir. 1933). The plaintiff still must establish: 1) a duty of care; 2) a breach of that duty; and 3) damage occurring as a proximate result of that breach. *Davis v. Burlington Northern, Inc.*, 541 F.2d 182, 185 (8th Cir.), *cert. denied*, 429 U.S. 1002 (1976) (a plaintiff's prima facie case under the Act must include all the same elements as are found in a common law negligence action).

As mentioned above, *see, infra*, at 2, plaintiff claims defendant breached five, distinct duties of care it owed to her decedent. The Court addresses plaintiff's claims *ad seriatim*.

a. Improper Training

Plaintiff claims that defendant failed to properly train the decedent to operate the brush cutter and that its failure to do so was a proximate cause of decedent's injuries and eventual death.

To be sure, a railroad has a duty to "instruct and caution [its employees] regarding a risk of employment of which the latter is excusably ignorant." *Bailey v. Central Vermont Railway, Inc.*, 113 Vt. 8, 14 (1942), *rev'd on other grounds*, 319 U.S. 350 (1943). In *Bailey*, the Vermont Supreme Court concluded, as a matter of law,

that the decedent, even though he rarely opened the hatch that caused the accident, "could not have failed to observe that the door opened quickly, and he must have known that that would spin the shaft." *Id.* at 14. The Court thus concluded that the railroad had not breached its duty to train the decedent.

In this case, the decedent was given ample training prior to operating the brush cutter on his own. After the training, he operated the brush cutter for approximately 26 days, without incident, before the accident. There has been no showing that the degree of training provided deviated from the training railroad workers normally receive in the trade. Given the cause of the accident—steering off the tracks—this Court must conclude that, as in *Bailey*, plaintiff's decedent could not have been ignorant of the fact that the brush cutter could be steered off the tracks if operated without either locking mechanism in place. Moreover, in view of the training he received, if Bailey was ignorant of that fact, his ignorance is not excusable. *See Bailey, supra*, at 14. As a matter of law, then, defendant did not breach its duty to properly train plaintiff's decedent.

b. Hazardous Condition

The plaintiff also alleges the brush cutter was in a hazardous condition at the time of the accident in that: 1) defendant improperly altered the steering mechanism; 2) the brush cutter was improperly prepared for hi-rail movement; and 3) the brush cutter was top heavy.

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Assuming defendant has a duty to protect against these alleged hazards, all three claims must nevertheless fail for lack of proof. The record is utterly devoid of any evidence that the hi-rails were improperly prepared for on-track operation or that the brush cutter was top heavy or, if it was, that the condition rendered it improperly hazardous. There was also insufficient evidence from which the Court could conclude that the steering mechanism was altered from its manufactured design.

To be sure, a railroad has a paramount duty to provide a safe workplace. *Shenker v. Baltimore & Ohio Railroad*, 374 U.S. 1 (1963). To fulfill that duty the railroad must take all reasonable steps to provide a safe place to work. *Nivens v. St. Louis Southwestern Railway Co.*, 425 F.2d 114 (5th Cir. 1970). However, the railroad is not required to guard against unforeseeable risks. *Id.* at 118. After scrutinizing the record, the Court concludes that there is insufficient evidence to hold that the brush cutter was not reasonably safe.

Moreover, even assuming there was an alteration in the steering mechanism and that the alteration caused the accident, we cannot say that such an occurrence was foreseeable, as the machine had worked properly for a good deal of time prior to the accident. In this regard, we note that the alleged alteration, were it proved, would not be *prima facie* evidence of negligence; for a railroad does not have a duty to use state-of-the-art equipment. *See Bailey, supra*, at 10.

Appendix "C"—Findings of Fact, Conclusions of Law and Order of the United States District Court for the District of Vermont, Civil Docket No. 83-290, entered June 28, 1985.

c. Improper Maintenance of Track

Plaintiff's third claim is that defendant failed to properly maintain the track and that its failure to do so was a proximate cause of the accident and the decedent's injuries. A railroad has a non-delegable duty, discussed above, to provide a safe place to work. *See Nivens, supra.* Adequate maintenance of the track certainly falls within the scope of that duty. *See, e.g., Kansas City Southern Railway Co. v. Nectaux,* 26 F.2d 317 (5th Cir. 1928). In determining whether the tracks are in a reasonably safe condition, industry practice is the proper standard against which to measure defendant's conduct. *Wilson v. Norfolk and Western Railway Co.,* 440 N.E.2d 238 (Ill. App. 1982).

The only evidence offered in support of plaintiff's claim that the tracks were negligently maintained is the fact that there was a $^3/_8$" dip discovered at a point in the track 360 feet east of the scene of the accident. Measuring this dip against the FRA standard of 1¼ inches, we cannot say that defendant's conduct departed from the standard of care in the industry. In sum, the defendant did not breach its duty to provide safe track.

d. Failure to Follow Safety Rules

Plaintiff's fourth claim is that defendant failed to follow its own safety rules and that this omission was a proximate cause of the accident. Canadian National has a safety rule that requires that there be two men "working together" at all times. Plaintiff claims that decedent and Riendeau were not working together at the time of the accident.

Appendix "C"—Findings of Fact, Conclusions of Law and Order of the United States District Court for the District of Vermont, Civil Docket No. 83-290, entered June 28, 1985.

A railroad has a duty to establish safety rules for the guidance and protection of its employees and, once promulgated, the employee is generally entitled to rely on these safety rules as the appropriate standard of conduct. *Ybarra v. Burlington Northern Inc.*, 689 F.2d 147 (8th Cir. 1982). Where, however, those safety rules have been nullified by custom and practice, an employee is not justified in relying on them. *Wilson v. Norfolk and Western Railway Co.*, 440 N.E.2d 238, 248 (Ill. App. 1982).

In this case, as the facts bear out, the custom and practice among CN employees on the tracks was to have one worker operate equipment on the track with the other traveling by vehicle on the highway to flag crossings. Assuming, without deciding, that this practice violated defendant's safety rules, such a violation is not probative of negligence because of defendant's employees' established pattern of violation. Thus, as a matter of law, defendant did not breach its duty to follow safety rules.

e. Failure to Make Diligent Search For and Rescue of Decedent

Plaintiff's last claim is that defendant, through its agents, was negligent in that it did not make a diligent search for, and rescue of, the decedent. Assuming the defendant owed the decedent a duty to conduct a diligent search and rescue, we must conclude that the duty was not breached, as there are no facts from which this Court

can conclude that defendant, through its agents, acted in a manner that deviated from the standard of reasonableness imposed upon railroads.

In no way did defendant's employees delay in their search for decedent. When he arrived at the scene of the accident, Riendeau immediately radioed for help. When assistance arrived, cables were placed on the brush cutter to wench it off of the decedent. There is nothing in the record that would permit this Court to conclude that the rescue operation could have been conducted more quickly. In sum, the defendant simply was not negligent in its search for and rescue of decedent.

ORDER

For the foregoing reasons, judgment is hereby granted in favor of defendant.

SO ORDERED.

Dated at Rutland in the District of Vermont this 28th day of June, 1985.

FRANKLIN S. BILLINGS, JR.
Franklin S. Billings, Jr.
District Judge

APPENDIX "D"

Judgment of the United States District Court for the District of Vermont, Civil Docket No. 83-290, entered June 28, 1985

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

Case Title
Eileen Bailey, as Administratrix of the Personal Estate of Jeffrey W. Bailey, Deceases

vs.

Grand Truck Lines New Entland, et al.

District Vermont

Docket Number Civ. 83-290

Name of Judge
Franklin S. Billings, Jr., District Judge

[ ] *Jury Verdict.* This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[x] *Decision by Court.* This action came to trial or before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is entered for the Defendant.

Clerk LEONARD W. LAFAYETTE

(By) Deputy Clerk C BURBANK

Date June 28, 1985

APPENDIX "E"

Order of the United States Court of Appeals for the Second Circuit, Docket No. 85-7583, entered March 19, 1987

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 19th day of March one thousand nine hundred and eighty-seven.

United States Court of Appeals
Filed
Mar 19 1987
Elaine B. Goldsmith, Clerk
Second Circuit

Docket No. 85-7583

EILEEN BAILEY,

Plaintiff-Appellant,

against

GRAND TRUNK LINES NEW ENGLAND, CANADIAN NATIONAL RAILWAY, MIDLINE DIVISION, ST. LAWRENCE REGION,

Defendants-Appellees.

Appendix "E"—Order of the United States Court of Appeals for the Second Circuit, Docket No. 85-7583, entered March 19, 1987.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant Eileen Bailey.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk